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FILED
MAR 31 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 689

CHARLES MELTON LEFORS, *Petitioner*,

vs.

THE STATE OF TEXAS, *Respondent*.

Case No. 26,987, Court of Criminal Appeals of the State of Texas.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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THE STATE OF TEXAS, *Respondent*.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Charles Melton Lefors, hereinafter referred to as petitioner, prays that writ of certiorari issue to the Court of Criminal Appeals of the State of Texas to review a judgment of final conviction of petitioner, dated December 1st, 1954 (R 624), adjudging him guilty of theft of personal property of more than the value of fifty dollars, and of having theretofore been convicted of a similar offense, and a mandatory sentence of ten years in the Penitentiary of the State of Texas (R 52).

STATEMENT OF THE CASE

On October 8th, 1953, Petitioner was indicted in the Criminal District Court of Jefferson County, Texas, for theft of personal property of the value of Fifty Dollars or more (a felony under the laws of the State of Texas), and with theretofore having been convicted of a similar offense. (R 4) On the 14th Day of January, 1954, petitioner was convicted of the offense charged and the jury further found that he had theretofore been convicted of an offense of like character (R 50-52), which said finding of former conviction made it mandatory under the Habitual Criminal Act of the State of Texas (Article 62 of the Penal Code of the State of Texas) that he be sentenced to serve ten years in the State Penitentiary, which was accordingly done (R 51-53).

From said verdict of the jury and sentence and judgment of the Court, Petitioner duly appealed to the Court of Criminal Appeals of Texas (R 54-56), which is the Court of last resort of the State of Texas in criminal litigation. On May 26th, 1954, the Court of Criminal Appeals of Texas, affirmed his conviction (See Appendix A). Through regular and due channels (Appendix B and Final Judgment of the Court of Criminal Appeals R 624) he exhausted his State Remedies, and here now files this petition for Writ of Certiorari. The Court of Criminal Appeals of Texas issued its order staying the issuance of Mandate herein pending this Petition.

OPINIONS OF THE COURT BELOW

The opinions of the Court of Criminal Appeals of the State of Texas, being judicially known to this Honorable Court as the Court of last resort in criminal cases, in affirming petitioner's conviction below, and its opinion in overruling his first motion for rehearing have not been officially reported, but are attached hereto as Appendix A and B respectfully. He duly filed his second motion for rehearing, which was overruled without written opinion (R 62), which was a final judgment under the law of the State of Texas, and the Rules of the Court of Criminal Appeals of the State of Texas, which will more fully appear in a Certificate of the Clerk of that Court, filed with the record in this case, as a part thereof, which shows:

STATE OF TEXAS)
COUNTY OF TRAVIS)

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that Cause No. 26,987, styled *CHARLES MELTON LEFORS, alias SONNY LeFORS vs. STATE OF TEXAS* was affirmed by this Court on May 26, 1954; Appellant's Motion for Rehearing was overruled on November 3, 1954 and Appellant's Second

Motion for Rehearing was overruled, without written opinion, on December 1, 1954.

THEREFORE, this case was disposed of by this Court with the overruling of Appellant's Second Motion for Rehearing and mandate would have issued if Appellant had not timely filed a Motion to Stay Issuance of Mandate for Application for a Writ of Certiorari in The United States Supreme Court.

The appellant had exhausted all remedy in this Court with the overruling of Appellant's Second Motion for Rehearing and said judgment became final on the docket of this Court.

WITNESS my hand and seal of said Court, at office in Austin, Texas, this 8th day of March, A. D. 1955.

.....

GLENN HAYNES
Clerk, Court of Criminal Appeals

JURISDICTION

Jurisdiction of this Court is invoked upon the grounds:

(a). He has exhausted his state remedies (Paragraph 1, supra).

(b). Under Section 1257 (3) Title 28 United States Code, Annotated.

(c). In overruling petitioner's motion to suppress a purported voluntary statement, admitting guilt, of petitioner, taken as the direct result of undue and un-

lawful arrest, incarceration, confinement, abuse, torture, beatings, punishment and unlawful administration of drugs, the trial court decided an important and fundamental question of Federal Law, which was sanctioned and approved by the Court of Criminal Appeals of the State of Texas (R 35), in direct conflict with the applicable decisions of this Honorable Court, and particularly in conflict with *Ward vs. Texas*, 316 U.S. 547, 86 L. Ed. 682, 62 S. Ct. 1139; *Brown vs. Misissippi*, 297 U.S. 278, 80 L. Ed. 682, 56 S. Ct. 461; *Chambers Vs. Florida*, 309 U.S. 227, 84 L. Ed. 716, 60 S. Ct. 427; *Canty vs. Alabama*, 309 U.S. 629, 84 L. Ed. 988, 60 S. Ct. 612; *White vs. Texas*, 311 U.S. 530, 84 L. Ed. 1342, 60 S. Ct. 1032; *Lomax vs. Texas*, 313 U.S. 544, 85 L. Ed. 1511, 61 S. Ct. 956; *Vernon vs. Alabama*, 313 U.S. 547, 85 L. Ed. 1513, 61 S. Ct. 1092.

(d). Petitioner was convicted in Criminal District Court, of Jefferson County, Texas, January 14th, 1954, and sentenced as a second offender to ten years confinement in the penitentiary of the State of Texas (R 50-52).

(e). He seasonably appealed from said judgment and sentence to the Court of Criminal Appeals of Texas (R 56).

(f). On May 26th, 1954, the Court of Criminal Appeals of the State of Texas, by written opinion (Appendix A, (R 597), affirmed the conviction below.

(g). Petitioner seasonably filed his motion for rehearing (R 604).

(h). On November 3rd, 1954, by written opinion (Appendix B. (R 616) the Court of Criminal Appeals of the State of Texas overruled his motion for rehearing.

(i). Petitioner seasonably filed his second motion for rehearing (R 621) which was overruled by the Court without written opinion, which precluded him from seeking further relief from the Court of Criminal Appeals (R 624), and exhausted his State remedy, and said conviction became final December 1st, 1954 (See certificate of Clerk of Court of Criminal Appeals, attached to the record herewith filed and with leave of this Honorable Court, makes it a part of this record.)

(j). The Court of Criminal Appeals of the State of Texas stayed the issuance of mandate for 90 days within which Petitioner might apply to the Supreme Court of the United States for writ of certiorari (See Certificate mentioned in paragraph (i) immediately above).

(k). On March 2nd, 1955, the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States, extended the time in which petitioner might file his petition for certiorari to and including March 31st, 1955, as follows:

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(Copy)

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. ———

CHARLES MELTON LEFORS

vs.

THE STATE OF TEXAS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 31, 1955.

.....

/S/ Hugo L. Black

Associate Justice of the Supreme Court of the United States.

Dated this 2nd Day of
March, 1955.

QUESTIONS PRESENTED FOR REVIEW

The questions here presented to this Honorable Court for review are:

(a). Was the purported voluntary statement of petitioner, admitting his guilt of the crime charged, voluntary or was it extracted from him in violation of the due process clause of the Constitution of the United States?

(b). Was the Action of the Court of Criminal Appeals of the State of Texas in "finding from its records," independent of the evidence adduced on the trial of the case, of which petitioner had no right of cross-examination, that the former conviction resulted in a final judgment, where there was no evidence offered to the jury that such judgment ever became final, in violation of the "confrontation by accusers clause of the Constitution of the United States.

Petitioner seasonably filed his motion to suppress the use against him of the purported voluntary statement (R 39), on the ground, among others, such statement was obtained under duress, in that he was forced to give same, by reason of unlawful arrest, detention, torture and brutality, in violation of the Fourteenth Amendment to the Constitution of the United States. When this alleged voluntary statement was tendered the trial court, upon motion of petitioner, retired the jury and

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heard evidence as to the admissibility of the statement (R 86-231). At this hearing, it was conclusively shown that petitioner was arrested at his place of business in Dallas, Dallas County, Texas, without a warrant from Newton County, and was not taken before a magistrate, as is provided by Article 217 of Vernon's Code of Criminal Procedure of the State of Texas (Supra), but instead he was taken from Dallas to Newton, Texas, some 200 miles from Dallas and there incarcerated in jail (R 86-231). He was later taken to Beaumont, Texas, and shunted around from county to county, and from jail to jail, and was never taken before a magistrate (R 86-231), for a total of 58 days.

Petitioner testified (R 100 et seq. see 135), and ably corroborated by the witnesses, Maxwell (R 138-41), Nowlin, (R 141-55) and Roy Richburgh (R 31-37), all Dallas Officers, that during this time he was beaten, abused, tortured and forced to give the statement in question, and that the statement given was not true. He also testified, corroborated by the doctor (R 150), and the special investigator for the District Attorney at Beaumont (R 29 et seq.), and many others (R 86-231) that he was illegally, unlawfully, and against his will, taken to the Doctor's Office, was drugged to the point he knew nothing that went on, and was interrogated at great length.

The trial court overruled the motion to suppress, and ordered the statement introduced into evidence, to which petitioner duly excepted (R 35). The trial court

submitted the question as to whether or not the statement was voluntarily given (R 35), and this issue was decided against petitioner, but under this action does not preclude this Honorable Court from making its own investigation of the facts and judging whether the statement was voluntarily given.

Petitioner earnestly urges that without the alleged voluntary statement, the jury could not have found him guilty. The injured party, the landlady, Marie (R 3 Neg) never firmly identified petitioner as one of the men that was at her place on the date of the theft. Besides all she could testify was that she missed the jewelry, and that petitioner was one of the three men that were in a position to have stolen the jewelry. The witness, Aeby, (R 272) was an accomplice, as charged by trial court, (R [redacted]), and under Article 718 of Vernon's Code of Criminal Procedure of the State of Texas (post) the jury shall not convict on the uncorroborated testimony of an accomplice. Petitioner timely filed his motions for an instructed verdit of not guilty (R 25), upon the grounds the evidence was insufficient, but the trial court overruled same, and petitioner duly excepted (R 25-26).

Petitioner was indicted for theft or personal property of the value of Fifty Dollars or more under the provisions of Articles 1410 and 1421 of Vernon's Penal Code of the State of Texas (quoted post) (R 4). The indictment also charged that petitioner had theretofore been finally convicted of a similar offense in Criminal Dis-

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trict Court No. 2 of Dallas County, Texas (R 5). Under the provisions of Article 62 of Vernon's Penal Code of the State of Texas (quoted post) if the jury found him guilty of the offense charged, and further found that he had theretofore been convicted of a similar offense, which was done in this case (R 49-51), it was mandatory that the judge, and not the jury, assess the maximum sentence of ten years in the penitentiary of the State of Texas, which was accordingly done (R 54). In other words, the penalty was fixed by law. In all other cases, the jury fixes the penalty. To establish this former conviction, the State offered in evidence a purported certified copy of a former conviction of similar nature in Criminal District Court No. 2 of Dallas County, Texas, (R 597), which showed that from such judgment of conviction and sentence imposed, petitioner appealed to the Court of Criminal Appeals of the State of Texas, and, therefore, it was shown on the face of the judgment, introduced by the State of Texas, and relied upon by it to establish such former conviction of a similar offense it was not a final judgment. It is true petitioner stipulated with the State that the defendant (petitioner) was the same person named in that judgment, but specifically refused to stipulate this judgment ever became final (R 597). The State offered no proof this judgment and conviction ever became final, but relied on the judgment, showing an appeal had been taken, entirely to establish such former conviction.

Petitioner duly raised this point and earnestly urged it before the Court of Criminal Appeals of the State of Texas in his original appeal, and particularly vigorously urged it in his motion for rehearing (R 604). But the Court of Criminal Appeals, in its written opinion on said motion for rehearing (Appendix B, R 616) held that they, the Court of Criminal Appeals, could search their records and determine if the judgment became final, although the statute, Article 62 of Vernon's Penal Code of the State of Texas provides it is a question of fact that must be shown *"on the trial."* Petitioner filed his second motion for rehearing (R 621) and earnestly urged such action of the Court of Criminal Appeals amounted the denial of his right to be confronted by, and the cross-examination of, his accusers, and as applied to him was in violation of the Fourteenth Amendment to the Constitution of the United States. He also urged such holding by the Court was in direct contrast with the opinion of the Court of Criminal Appeals in *Newsom vs. State*, 123 S.W. (2) 887, but the Court of Criminal Appeals overruled his second motion for rehearing without written opinion.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States, guaranteed to petitioner by the Fourteenth Amendment, provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an im-

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partial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense." (Emphasis added)

The appropriate provisions of the Fourteenth Amendment to the Constitution of the United States involved here are:

Section 1:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny any person within its jurisdiction the equal protection of the law."

The appropriate provision of the Fifth Amendment to the Constitution of the United States, which are guaranteed to petitioner by the Fourteenth Amendments in this case are:

"* * * nor shall be compelled in any criminal case to be a witness against himself."

UNITED STATES STATUTES INVOLVED

The appropriate provisions of Section 1257, Title 28, United States Code, Annotated, provide:

"Final Judgment or decree rendered by the highest court of a State in which a decision could be made, may be reviewed by the Supreme Court as follows:
* * *

(3). By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATUTES OF THE STATE OF TEXAS INVOLVED

Article 212 of Vernon's Code of Criminal Procedure of the State of Texas provides:

> "A peace officer or any other person, may, without warrant, arrest an offender when the offense is commited within his presence, if the offense is classed a felony, or as an 'offense against the public peace'."

Article 213 Vernon's Code of Criminal Procedure of the State of Texas provides:

> "A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate verbally orders the arrest of the offender."

Article 215 of Vernon's Code of Criminal Procedure of the State of Texas provides:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, *and that the offender is about to escape*, so there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused." (Emphasis ours).

In this case it is undisputed, and, in fact, proved by all of the peace officers participating in petitioner's arrest,

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and by the petitioner himself, upon the hearing on the motion to suppress the alleged "voluntary statement" given by petitioner (R 86-231) that petitioner was at work in his grocery store in the city of Dallas, which he had owned and operated for several years, and was arrested there by the officers about 9 o'clock in the night time. There was no evidence or symbol of evidence that a warrant could not have been secured or that any flight was contemplated. Certainly there was none that he had committed any offense in the presence of the arresting officers.

Article 217 of Vernon's Code of Criminal Procedure of the State of Texas provides:

> "In each case enumerated in this Chapter, the person making the arrest *shall* (Emphasis ours) *immediately* take the person arrested before the nearest magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order."

He was never taken before a magistrate, but, instead, was taken to Newton County, Texas, more than 200 miles from Dallas, placed in jail, denied the right to consult counsel or see his family, shunted around from county to county, from jail to jail, beat, abused, tortured for 58 days (R 86-231), and even was taken before a Doctor and was administered drugs, against his consent and in violation of the Fourteenth Amendment to the Constitution of the United States, and, in fact, against the well settled precepts of justice of civilized governments every-

where. As a result of this punishment he finally gave a confession which was used in his trial, and without which no conviction could have been had.

Petitioner earnestly urges such actions of the officials of the State of Texas above set out were in violation of the Fourteenth Amendment to the Constitution of the United States, and in direct conflict with the settled doctrine of the Court of Criminal Appeals of the State of Texas (The Court of last resort under the Constitution of the State of Texas), heretofore held in *Prince vs. State*, 155 Cr. R. 108, 231 S.W. 2nd 419, and by this Honorable Court in *Ward vs. State of Texas*, 62 S. Ct. 1139, 316 U.S. 547, 86 L. Ed. 682; *White vs. State of Texas*, 311 U. S. 530, 84 L. Ed. 1342, 60 S. Ct. 1032; *Brown vs. Mississippi*, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461; *Chambers vs. Florida*, 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 427; *Canty vs. Alabama*, 309 U. S. 629, 84 L. Ed. 988, 60 S. Ct. 612; *Lomax vs. Texas*, 313 U. S. 544, 85 L. Ed. 1511, 61 S. Ct. 956; and *Vernon vs. Alabama*, 313 U. S. 547, 85 L. Ed. 1513, 61 S. Ct. 1092.

Article 1410 of Vernon's Penal Code of the State of Texas provides:

> "'Theft' is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of same, without his consent, and to appropriate it to the use and benefit of the person taking."

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Article 1421 of Vernon's Penal Code of the State of Texas provides:

> "Theft of property of the value of fifty dollars or over shall be punished by confinement in the penitentiary not less than two nor more than ten years."

Article 62 of Vernon's Penal Code of the State of Texas, commonly called "The Habitual Criminal Act," provides:

> "If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offense in ordinary cases."

Article 718 of Vernon's Code of Criminal Procedure of the State of Texas provides:

> "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

Article 693 of Vernon's Code of Criminal Procedure of The State of Texas, provides:

> "The verdict in every criminal action must be general. Where there are special pleas upon which the jury are to find, they must say in their verdict that the allegations in such pleas are true or untrue. If the plea is not guilty, they must find that the defendant is either 'guilty' or 'not guilty,' and they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty."

It can not be presumed the jury might not have fixed a penalty less than ten years had they been permitted to do so. The statute is plain the punishment *shall* be fixed by the jury in *all* cases if it is not "*absolutely fixed by law.*" Then, under Article 62 of Vernon's Code of Criminal Procedure of the State of Texas (supra) in this case the *right* to affix the penalty was taken away from the jury, and amounted to forcing the judge to assess a penalty of ten years confinement in the penitentiary of the State of Texas.

The right of every accused to be confronted by his accusers is guaranteed by the Sixth Amendment to the Constitution of the United States, and when a state or state authorities violate this Constitutional provision, such action amounts to the denial of due process, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It is true that petitioner stipulated (R 6/3-15) he was one and the same person who had theretofore been convicted of a similar offense in Criminal District Court, Dallas County, Texas, but he specifically refused to stipulate that conviction ever reached the final judgment stage. This Honorable Court, of course, will take judicial knowledge no judgment is final as long as a permitted appeal is pending. The judgment of former conviction showed, on its face, that notice of appeal was given at the time said judgment was entered (R Ex 1 and 2), and the State of Texas offered no evidence whatever that this judgment ever became final. But, in direct violation of

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the confrontation provisions of the Constitution of the United States, and in direct violation of its holding in the case of *Newsom vs. State of Texas*, 123 S. W. 2nd 887, not even in the presence and hearing of the jury, and without opportunity to cross-examine by petitioner, they held in this case they could search, for themselves, the records of the Court of Criminal Appeals, and determine for themselves, leaving petitioner entirely out of it, whether such conviction, alleged to have been a similar one, had become final (R 617-19).

CONCLUSION

Petitioner urges that his illegal arrest, not being allowed to go before a magistrate, to contact family or counsel, or get word to them, and his long confinement of fifty-eight days, his constant torture, abuse and beatings in order to force a confession from him, are not only in violation of due process guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, but smacks of barbarism reminiscent of the days of the Inquisition.

He believes, and so urges, the facts and law involved in his case are so parallel with those in the cases of *Ward vs. Texas*; *Brown vs. Mississippi; Chambers vs. Florida; Canty vs. Alabama;* and *White vs. Texas*, sanctioned and approved in *Lomax vs. Texas;* and *Vernon vs. Alabama* (supra) as to require the granting of this writ.

The "Notice of Appeal" set out at the end of the judgment of former conviction (R ~~_____~~) is sufficient to

give the Court of Criminal Appeals of the State of Texas jurisdiction. As a matter of fact the Court of Criminal Appeals says so in its opinion overruling petitioner's motion for rehearing:

> "We have also held that a notice of appeal is sufficient which recites that appellant 'gives this his notice of appeal. Braun Vs State, 257 S.W. (2) 708.
>
> > "Also, in Brannan Vs State, 175 S.W. (2) 697, and Newsom Vs State, 151 S. W. (2) 225, we have upheld the sufficiency of the entry of notice of appeal where shown in the sentence, as it appears in the minutes of the trial court.
>
> "Appellant relies upon these holdings and others where the question before us was an accused's right to have a review on appeal of a conviction against him. In such a situation this court views the record in the light of the right of appeal being favored and the statutes are to be liberally construed and interpreted in order to avoid, if possible, a forfeiture of such right." (Appendix B, R 617-19).
>
> > "The Court of Criminal Appeals also held that if the state's evidence showed the judgment of prior conviction showed it had been appealed from, the defendant was relieved from the burden of showing the prior judgment was not a final one:
>
> "We held in Newsome Vs State, 123 S.W. (2) 887, that if the state's evidence shows that the prior judgment relied upon was appealed from, the defendant is relieved of the burden ordinarily resting upon him to show that the prior conviction was not final. It was pointed out in the Newsom case that the records of this court failed to show that such appeal had reached us." (Appendix B, R 617-19).

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Since Article 62 of Vernon's Penal Code of the State of Texas (supra) provides that whether petitioner had been theretofore convicted of an offense of like character is a question of fact that must be passed upon by the jury, petitioner earnestly urges the action of the Court of Criminal Appeals in substituting its investigation, and finding as a fact the former conviction had become final, even though no evidence of its finality had been submitted to the jury, is so void of due process as to require the granting of this writ.

For the reasons stated, it is respectfully submitted that this petition should be granted.

MAURY HUGHES,
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Dallas, Texas

Counsel for Petitioner.

HOWARD DAILEY,
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Dallas, Texas,

Of Counsel

PROOF OF SERVICE

I, Maury Hughes, Counsel for Petitioner, and Licensed to practice before The Supreme Court of the United States, Certify that I did, on the 30 Day of March, A.D., 1955, serve two copies of the above and foregoing Petition for Certiorari upon the Honorable John Ben Shep-

pard, Attorney General of the State of Texas, by mailing same to his Office in Austin, Texas, and that I did, on the ——— Day of March, A.D., 1955, serve 5 copies of this Petition upon the Honorable Simon E. Sobeloff, The Solicitor General of the United States, by delivering same to his Office in the Justice Department of the United States, Washington, D.C.

MAURY HUGHES,
910 David Building,
Dallas, Texas
Counsel for Petitioner

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No, 26,987

APPENDIX A

CHARLES MELTON LEFORS ALIAS SONNEY LEFORS,
Appellant

VS.

THE STATE OF TEXAS, *Appellee*

APPEAL FROM JEFFERSON COUNTY

AFFIRMED

OPINION BY MORRISON, *Judge.*

FILED IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

May 26, 1954

Glenn Haynes, *Clerk*

No. 26,987

CHARLES MELTON LEFORS ALIAS SONNY LEFORS,
Appellant

VS.

THE STATE OF TEXAS, *Appellee*

Appeal from Jefferson County

OPINION

The offense is felony theft, with a prior conviction for an offense of like character plead to enhance the punishment; the punishment, ten years.

A ring, certain diamond earrings and a sum of money were stolen from the cedar chest of Marie Ellis in Beaumont. Their total value was shown to be far in excess of $50.00.

Appellant's guilt is shown by four incriminating facts:

1. Marie identified appellant as being one of three men who came to her place of business, who remained in the vicinity of her cedar chest while she and the other two went to the back of the house, and who was seen coming from the rest room when they returned. She stated that

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after the three left she noticed that her valuables had been taken from her cedar chest.

2. Appellant's written confession recites that he took the objects from the chest in the absence of the other three.

3. Appellant's oral confession was made sometime later, in which he told Officer Wingate where his companion had disposed of the diamonds and which enabled the officer to recover the stolen gems.

4. The testimony of appellant's companion, an accomplice, Neal Aeby, corroborated Marie's testimony, and, in addition, he stated that he saw the diamond earrings in the possession of their companion Braggins as he, Braggins and the appellant left Marie's place.

Appellant's able counsel devotes the greater portion of his 97-page brief to the question of the admissibility of appellant's written confession. The question of the voluntary nature of appellant's confession was submitted to the jury, and, since they have passed upon the issues of fact raised by virtue of the conflict between the testimony of appellant and the officers who had him in custody, our task is to determine whether the confession was inadmissible as a matter of law. The test applied by this Court and the Supreme Court of the United States in determining such question is to examine the undisputed evidence and determine therefrom if there is any evidence which would render the confession inadmissible.

We shall attempt to eliminate from discussion corollary issues which might affect the credibility of the witnesses.

Appellant was arrested at his place of business in the City of Dallas in North Texas in the early evening of April 4 by Texas Ranger Phillips, Officer Wingate of the Beaumont City Police, and Deputy Sheriff Bridges of Jefferson County. They had in their possession a warrant for appellant's arrest issued in Jefferson County. Appellant asked for permission to telephone Bill Decker, Sheriff of Dallas County, which permission was refused. These officers had another prisoner in the automobile with them at the time, and shortly after arresting appellant they left Dallas and proceeded in a southeasterly direction to Woodville, where they left Ranger Phillips, and proceeded in the same direction until they arrived in Newton in Newton County. Both Newton and Beaumont are in the extreme southeasterly corner of Texas. They arrived in Newton at approximately 3:00 a.m. of April 5, and there deposited the appellant with Sheriff Humphreys of that county, who had a warrant for appellant's arrest, and then proceeded on to Beaumont with their other prisoner. Appellant was questioned by Sheriff Humphreys for approximately two hours immediately before noon on April 5, and the sheriff decided that he did not have sufficient evidence to support the charge against the appellant which he had pending in his county. Appellant was not carried before a magistrate in Newton County, and he does not claim that any brutality was inflicted upon him while

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there. Appellant's mother and sister came to Newton and were refused permission to enter the jail. The jail is evidently a one-story structure. The deputy sheriff says that he did not permit visitors inside the jail to visit prisoners when he was there alone, as he was on this day, because of his fear of an escape attempt. He says, however, that they stood on the outside and talked to appellant an unlimited time. Appellant's mother and sister say that they saw the appellant in the jail and that he called to them. They do not say whether or not they talked to him.

Sometime in the early morning of April 6 two officers came from Beaumont, reassumed custody of appellant, carried him to Beaumont and before a justice of the peace and thence to jail.

The confession is dated April 7. Dean Eberhard, the investigator for the district attorney's office, testified that the confession was made on that day. The appellant does not deny that it was made on that day but says that he does not remember making it at all. We must therefore test its admissibility as if it were made on that day.

The record discloses that the appellant was detained in the Beaumont jail for approximately a month following the making of this confession, during which time he was questioned at some length about certain murders to which he did not confess and about numerous burglaries, to some of which it appears he did confess. Appellant claims

brutality was inflicted upon him during his confinement in Beaumont. We will not in this case pass upon the voluntary nature of any subsequent confessions he may have made. We will pass upon them if and when those cases reach us. We will limit our consideration of this case to treatment accorded appellant prior to making this confession.

This is not a case where the accused was arrested without a warrant and made a confession before he was carried before a magistrate. All of the officers mentioned by the appellant were called in rebuttal and denied specifically all the mistreatment claimed by appellant. This leaves, then, the twenty-seven hour stopover in Newton before appellant was carried before a magistrate.

It has been the consistent holding of this Court and of the Supreme Court of the United States in passing on State court cases, that the rule in *McNabb v. U.S.*, 87 L. Ed. 819, does not apply and that the failure to take an accused forthwith before a magistrate does not in itself standing alone vitiate a confession. *Dimery v. State*, 240 S.W. 2d 293; *Gallegos v. Nebraska*, 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 86; *Shook v. State*, 244 S.W. 2d 220; *Leviness v. State* 247 S.W. 2d 115; *Golemon v. State*, 247 S.W. 2d 119 (writ of certiorari denied); *Gasway v. State*, 248 S.W. 2d 942 (writ of certiorari denied); *Paris v. State*, 249 S.W. 2d 217 (writ of certiorari denied); *Hulen v. State*, 250 S.W. 2d 211; *Stroble v. California*, 343 U.S.

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181, 72 S. Ct. 599, 96 L. Ed. 872; *Stein v. N.Y.*, 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522.

Appellant at great length challenges the legality of his arrest in Dallas. As stated, the officers had a warrant for the appellant's arrest, and they acted in accordance with the terms of Article 234, V.A.C.C.P., when they carried him before the magistrate in Jefferson County.

We find the confession admissible as a matter of law, and the jury has passed upon the conflict between the testimony of the appellant and the officers as to brutality.

Appellant says that the evidence is insufficient to support the conviction. A discussion of each contention raised would lengthen this opinion beyond justification. We shall discuss a few.

Appellant says there is no evidence that the valuables were taken from Marie without her consent. It is true that Marie did not say in so many words that the appellant took her property without her consent, but we do find in the appellant's confession the following: "No one gave me permission nor did I hear anyone give Neal or Bob permission to take anything from Marie's room."

The State relies upon *Cox v. State*, 164 S.W. 2d 848, and rightly so. In that case the owner of the hogs did not testify that they were taken without his consent, but the accused's confession said that he did not have the owner's consent to take them. We held that this constituent element of theft was established by the confession.

Appellant objected to the court's charge because it failed to define an accomplice and tell the jury if they found that the appellant was an accomplice to the theft they should acquit. Appellant testified that he did not go to Marie's place with Braggins and Aeby and knew nothing of the theft. Such testimony raises the issue of guilt vel non and nothing more.

Appellant objected to the court's charge because it instructed on the law of principals and then told the jury that Aeby was an accomplice as a matter of law. He says that an actor cannot be a principal and an accomplice at the same time. We will not pursue the matter further than to observe that the evidence shows that Aeby was a principal to the theft from Marie, and so when he came into court to testify about the theft he became an accomplice witness.

Finding no reversible error, the judgment of the trial court is affirmed.

Morrison, *Judge*

(Delivered May 26, 1954)

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APPENDIX B

No, 26,987

CHARLES MELTON LEFORS ALIAS SONNEY LEFORS,
Appellant

VS.

THE STATE OF TEXAS, *Appellee*

Appeal from Jefferson County

OPINION
ON APPELLANT'S MOTION FOR REHEARING

In proving the former conviction relied upon by the court in assessing the punishment under Art. 62, P.C., the state offered in evidence a certified copy of the sentence in Cause No. 5983(A) in Criminal District Court of Dallas County, dated June 22, 1940, which concludes as follows: ". . . and the said defendant is remanded to jail until said sheriff can obey the directions of this sentence gives notice of appeal."

Appellant points out that there was no proof as to the disposition of an appeal in said cause, and urges for the first time the insufficiency of the evidence to show a final conviction in Cause No. 5983(A).

We held in *Newsom v. State*, 123 S.W. 2d 887, that if the state's evidence shows that the prior judgment relied upon was appealed from, the defendant is relieved of the burden ordinarily resting upon him to show that the prior conviction was not final. It was pointed out in the *Newsom case* that the records of this court failed to show that such appeal had reached us.

We have also held that a notice of appeal is sufficient which recites that appellant "gives this, his notice of appeal." *Braun v. State*, 257 S.W. 2d 708.

Also, in *Brannan v. State*, 175 S.W. 2d 697, and *Newsom v. State*, 151 S.W. 2d 225, we have upheld the sufficiency of the entry of notice of appeal where shown in the sentence, as it appears in the minutes of the trial court.

Appellant relies upon these holdings and others where the question before us was an accused's right to have a review on appeal of a conviction against him. In such a situation this court views the record in the light of the right of appeal being favored and the statutes are to be liberally construed and interpreted in order to avoid, if possible, a forfeiture of such right.

We note that there is nothing in the sentence offered by the state here to show that the defendant or his counsel gave notice of appeal in the prior trial, or that it was given in open court.

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It is observed further that the historical fact of the conviction in Cause No. 5983(A) and its having become a final conviction long before the commission of the present offense is known to this court from its own records, because the conviction was affirmed in *LeForis v. State*, 148 S.W. 2d 201.

We also know from the records of our court that the notice of appeal which was relied upon was not that here shown, but was a notice in full and regular form, given when the motion for new trial was overruled, and was entered as a part of that order. The sentence, as found in that record on appeal, contains no reference whatever to an appeal having been taken.

Another fact which may bear on the question here is that it was admitted and stipulated that appellant was the same person who was sentenced in the former trial and the sentence was referred to in his testimony as a conviction. Until motion for rehearing in this court it was not suggested that the conviction was not final because of an appeal. The only reservation in the admission was that it would not be stipulated that such conviction was a valid conviction.

From the records of this court we know that the conviction was affirmed long prior to the present offense and was therefore valid.

Lastly, it should be remembered that the prior conviction was not a part of the offense charged, and that the

sole burden on the state, in order to have the punishment fixed under Art. 62, P.C., was to establish as an historical fact such prior conviction.

Under the facts here we would not be warranted in applying the rule stated in *Newsom v. State*, 123 S.W. 2d 887, and in reversing the conviction for failure of the state to show the affirmance of the judgment of conviction in the prior case. As stated, our records in that case did not show that Newsom's appeal had ever reached this court, whereas in the instant case they show the affirmance of the judgment and the issuance of the mandate.

Appellant's motion for rehearing is overruled.

Woodley, *Judge.*

(Delivered November 3, 1954.)

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EXHIBIT C

MINUTES OF COURT OF CRIMINAL APPEALS,
AUSTIN, TEXAS

No. 26,987

CHARLES MELTON LEFORS, Alias SONNY LEFORS,
Appellant,

vs.

THE STATE OF TEXAS, *Appellee*

Appeal from District Court of Jefferson County

AFFIRMED

OPINION BY JUDGE MORRISON

MAY 26, 1954

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

EXHIBIT D

STATE OF TEXAS,
County of Travis:

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS, AUSTIN, TEXAS

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that Cause No. 26,987, styled CHARLES MELTON LEFORS, alias *Sonny LeFors* vs. *State of Texas* was affirmed by this Court on May 26, 1954; Appellant's Motion for Rehearing was overruled on November 3, 1954, and Appellant's Second Motion for Rehearing was overruled, without written opinion, on December 1, 1954.

THEREFORE, this case was disposed of by this Court with the overruling of Appellant's Second Motion for Rehearing and mandate would have issued if Appellant had not timely filed a Motion to Stay Issuance of Mandate for Application for a Writ of Certiorari in The United States Supreme Court.

The appellant had exhausted all remedy in this Court with the overruling of Appellant's Second Motion for Rehearing and said judgment became final on the docket of this Court.

WITNESS my hand and seal of said Court, at office in Austin, Texas, this 8th day of March, A. D. 1955.

(SEAL.) GLENN HAYNES,
Clerk, Court of Criminal Appeals.

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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 689

CHARLES MELTON LEFORS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

Case No. 26,987, Court of Criminal Appeals
of the State of Texas

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes Respondent, The State of Texas, and files this its brief in opposition to the petition for writ of certiorari.

Opinions Below

The opinions of the Court of Criminal Appeals of the State of Texas in this case are not yet printed. They appear, however, in the Appendix of Petitioner's brief pages 24 through 34.

Jurisdiction

This Court does not have, nor should it exercise, jurisdiction under 28 U.S.C.A., Section 1257 (3), because:

The decision of the Court of Criminal Appeals of Texas rests upon non-federal grounds which adequately and independently support its holding as will hereinafter appear.

As stated in *Lynch v. New York*, 293 U.S. 52 (1934):

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Furthermore, where it appears that the judgment of the State Court *might** have rested on a non-federal ground, this Court will not take jurisdiction. *Stembridge v. Georgia*, 343 U.S. 541 (1952).

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It is submitted that the Court of Criminal Appeals of Texas in this case did not find it necessary to base its decision on the merits, if any, of a federal claim or claims, if any, but that adequate State grounds existed for final determination of the cause.

Questions Presented

1. Was Petitioner's confession voluntary and therefore admissible?
2. Was the action of the Court of Criminal Appeals of Texas in finding from its records that Petitioner's previous conviction was final, in violation of the United States Constitution on the basis that Petitioner has not been confronted by his accusers?

Statement

The Petitioner, Charles Melton LeFors, alias Sonny Lefors, was indicted on October 8th, 1953, for the offense of Felony Theft and Repetition of the same offense under Article 62 of the Penal Code of the State of Texas.

The primary offense was alleged to have been committed on or about the 23rd day of August, 1951, and alleged the theft of certain corporeal personal property from one Marie Ellis; the property alleged to have been taken being a pair of ear rings of the value of $250.00, a ring of the value of $60.00, and $15.00 cash. The prior offense was alleged to have been committed on the 27th day of February, 1940, in Dallas County, and the conviction was alleged to

*Emphasis added throughout.

have been on the 17th day of April, 1940, in the same county. The jury found Petitioner guilty of the offense of felony theft as charged in the indictment and further found that Petitioner had been convicted before of an offense of like character. (Tr. 49.) The court then entered judgment and sentenced Petitioner to a term of ten years in the State Penitentiary as provided by Article 62, Penal Code of the State of Texas. (Tr. 50-51.)

An authenticated copy of the indictment of the 1940 conviction, as well as an authenticated copy of the judgment and sentence in that cause, were introduced in evidence, and it was stipulated by the defense that the defendant presently on trial was the same man who was found guilty in the cause in Dallas County in 1940. (S.F. 1, 2, and 3, State's Ex. No. 1, 321 to 324.)

The facts as disclosed by the evidence adduced on the trial of this case show that Petitioner came to Beaumont in the company of one Neal Aeby and Bob Braggins in the month of August, 1951, for the purpose of "working on a box," meaning to open a safe. (S.F. 274 and 275.) That while they were in Beaumont they wandered into the Princess Night Club for the purpose of having a beer. That they were waited on by the proprietress of the place, one Marie Ellis, the injured party, and that no one else was present in the place except Marie Ellis and Petitioner, along with Neal Aeby and Bob Braggins. (S.F. 5, 276, 286.) While they were talking with Marie Ellis she made a remark that she wished she had what she used to have or how much money she used to have in here cedar chest. (S.F. 7, 276). The

cedar chest was in the same building in the living quarters of the injured party, Marie Ellis. The accomplices, Neal Aeby and Bob Braggins, later lured Marie Ellis to the back of her place so that they could give Petitioner LeFors a chance to look around in the cedar chest. (S.F. 277.) When Marie Ellis, Aeby and Braggins returned from the back end of the place Petitioner, LeFors, was seen to come from the area of Marie Ellis' bedroom in which the cedar chest was located. After the three men left the place Marie Ellis discovered that a pair of diamond earrings, an amethyst ring, and a small amount of money were missing from the purse and cigar box which had been in the aforesaid cedar chest. (S.F. 8.)

In order to establish the guilt of Petitioner, the State relied (1) upon his written confession (S.F. 331-333), (2) the oral confession of Petitioner which was corroborated by the finding of certain articles of the stolen property (S.F. 53-59), (3) the testimony of the accomplice witness, Neal Aeby (S.F. 272-289), and (4) the identification by the injured party, Marie Ellis, of Petitioner as being in her place of business on the day that the property was taken. (S.F. 13.)

Petitioner relied upon the defense of alibi and claimed that he had never been in the place belonging to Marie Ellis, but he did not attempt to establish where he was at the time that the theft was actually committed. He claimed that the written confession was coerced as the result of physical abuse, and that it was not freely and voluntarily given. This issue was controverted by the State and the issue as

to the voluntary nature of the confession was submitted to the jury.

Petitioner brings forward no informal bills of exception.

Argument

1. Was Petitioner's confession voluntary and therefore admissible? [Petitioner's question (a)]

The test applied by the Court of Criminal Appeals of Texas and the Supreme Court of the United States is to examine the undisputed evidence and determine therefrom if there is any evidence, prior to the confession used herein, which would render the confession inadmissible. *Chambers v. Florida*, 309 U.S. 227 (1940). And since a State court has a better opportunity to appraise conflicting testimony, this Court will give deference to the conclusions of the State court on disputed and essential issues of what actually happened. *Gallegos v. Nebraska*, 342 U.S. 55 (1951).

Bill of Exception No. 2 (Tr. p. 64), is based upon the trial Court's refusal to suppress the written confession introduced by the State in this case. After the State had qualified the person taking the confession and had shown that the same was taken in the manner required by law, Petitioner asked that the jury be retired and that the Court hear evidence on the motion to suppress the said confession. This was done and all of the testimony on the motion to suppress is incorporated in this bill of exception. After hearing the motion and the evidence, the Court allowed the written confession to be introduced as evidence but

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submitted the question of its voluntary nature to the jury under appropriate instructions. (Tr. 42.) It is Petitioner's contention that the evidence adduced on the motion to suppress showed that the confession was inadmissible as a matter of law.

In looking to the bill itself we find that the Petitioner detailed certain alleged cruel treatment on the part of certain officers, and testified that he gave the statement, if he gave it at all, as a result of such physical abuse. Each and every officer named by Petitioner was placed upon the stand by the State and categorically denied any abuse of any nature whatsoever. Thus the Court in his charge to the jury properly submitted the question of the voluntary character of the confession.

If the evidence raises an issue as to the facts necessary to be established to make the confession admissible, for example properly warning the accused, or the voluntary making, such issues are for the jury under appropriate instructions. *Sanchez v. State*, 155 Tex. Crim 364, 235 S.W. 2d 149 (1951); *Prince v. State*, 155 Tex. Crim. 108, 231 S.W. 2d 419 (1950); *Picket v. State*, 155 Tex. Crim. 195, 228 S.W. 2d 516 (1949); *Cooper v. State*, 154 Tex. Crim. 182, 226 S.W. 2d 122 (1949); *Martinez v. State*, 151 Tex. Crim. 316, 207 S.W. 2d 387 (1948); *Farrow v. State*, 152 Tex. Crim. 595, 216 S.W. 2d 217 (1949; *Holt v. State*, 151 Tex. Crim. 399, 208 S.W. 2d 643 (1948).

The facts as adduced by the State's witnesses on which the Petitioner relies as showing that the confession was inadmissible as a matter of law, are as follows: Petitioner was arrested at his place of business in Dallas, Texas, on the night of April 4, 1952,

by a Texas Ranger, a deputy sheriff from Jefferson County, and a city detective from Beaumont, Texas. The arrest was made by virtue of a warrant issued in Jefferson County, Texas, charging the Petitioner with the offense of Felony Theft. When Petitioner was arrested at his place of business in Dallas, Texas, he requested that he be allowed to call the Sheriff of Dallas County, and this request was refused by the officers. The Petitioner was placed under arrest and was placed in the car with the officers who were also carrying another prisoner who had been arrested, and proceeded toward Jefferson County. When they arrived at Woodville, Texas, the home of the Texas Ranger, they parted company and left the Ranger in Woodville and proceeded from there to Newton County, Texas, arriving there in the early morning hours of April 5, 1952. The purpose of taking Petitioner to Newton County rather than proceeding on to Beaumont with him is explained by the officers by showing that they wanted to question the other prisoner that they had with them and that they knew the Sheriff of Newton County had an outstanding warrant for this same defendant. When they arrived at Newton County, Texas, they turned over the prisoner (Petitioner) to the Sheriff of Newton County, Texas. The Sheriff of Newton County questioned Petitioner in reference to an offense committed in that county for approximately two hours after the officers from Jefferson County had left him there in his custody. When he was convinced that Petitioner had nothing to do with the offense committed in his county, he notified the officers from Jefferson County to come and pick him up. The of-

ficers from Jefferson County returned to Newton County during the early morning hours of April 6, 1952, and picked up Petitioner and proceeded on to Beaumont, Jefferson County, Texas, with him. When they arrived in Beaumont, they immediately took him before a magistrate to set his bond in the Jefferson County case. This was on Sunday morning of April 6, 1952. The confession of Petitioner was taken on the morning of April 7, 1952, the following day, by the investigator of the District Attorney's office. It is well to note that even though Petitioner detailed much abuse on the part of the officers, which he claims continued over a period of some 58 days, he does not deny specifically that this confession was taken on April 7th, less than three days after his arrest. In fact, Petitioner claims that although it is his signature on the confession, he does not remember making a confession, nor does he remember signing the same.

Inasmuch as the verdict of the jury constituted a finding that the confession was voluntarily made in accordance with the statutes of this State, Petitioner must show that the facts as a matter of law render the confession inadmissible. The only facts upon which Petitioner can rely as showing that the confession was inadmissible as a matter of law are those which show that Petitioner was not brought directly to Jefferson County, but was taken to Newton County where he was delayed some 24 hours before he was brought on to Jefferson County and then promptly carried before a magistrate.

In *Dimery v. State*, 156 Tex. Crim. 197, 240 S.W. 2d 293 (1951), where the accused was detained in

jail for four days without being taken before a magistrate prior to the taking of the confession, the Court of Criminal Appeals held that the confession was admissible unless it was shown that there existed a causal connection between the arrest and failure to take before a magistrate and the making of the confession. This case received the approval of the Supreme Court of the United States in *Gallegos v. Nebraska, supra.* In *Goleman v. State,* ..... Tex. Crim. ....., 247 S.W. 2d 119 (1952), the Court of Criminal Appeals held that, even though the arrest may have been made without a warrant, there still must be a causal connection between the failure of the officers to secure a warrant and the securing of a confession. In the instant case, the facts show that Petitioner was carried before a magistrate prior to the taking of the confession and was taken before a magistrate immediately upon his arrival in the county out of which the warrant had issued. Certainly there is no causal connection between the taking of the confession and the delay of some 24 hours in Newton County where another warrant was outstanding for the arrest of Petitioner herein. (Tr. 84-230.) Under these facts there is no violation of the Fourteenth Amendment to the United States Constitution.

2. Was the action of the Court of Criminal Appeals of Texas in finding from its records that Petitioner's previous conviction was final, in violation of the United States Constitution on the basis that Petitioner has not been confronted by his accusers? [Petitioner's Question (b).]

It is submitted that Petitioner could not, at the time of trial, offer any evidence in rebuttal as to the finality of his previous conviction. He urges for the first time in his first Motion for Rehearing that the evidence at the trial level was insufficient to show a previous final conviction. That the evidence is sufficient cannot be denied.

In *Newsom v. State,* 136 Tex. Crim. 114, 123 S.W. 2d 887 (1939), the Court of Criminal Appeals held that if the State's evidence shows that the prior judgment relied upon was appealed from, the defendant was relieved of the burden ordinarily resting upon him to show that the prior conviction was not final. The State's evidence herein did not show that the prior judgment was appealed from. A notice of appeal is quite generally a matter of form in all cases, but it does not follow that an appeal is actually perfected, and the judgment can therefore become final without an appeal.

Article 62 of the Penal Code of the State of Texas (Vernon 1948), reads as follows:

> "*If it be shown* on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

In proving the former conviction relied upon by the Court, the State offered in evidence a certified copy of the sentence in Cause No. 5983(a) in the

Criminal District Court of Dallas County, dated June 22, 1940.

Petitioner in no way rebutted this evidence, nor did he offer to do so.

The Court of Criminal Appeals in taking judicial notice of its own records does not operate to deprive Petitioner herein of any of his constitutional rights. Such judicial notice could have as easily operated in his favor if the conviction had not in fact become final.

The statute calls for the state to *show* that a defendant has previously been convicted, and the sole burden on the State was to establish as an historical fact such a prior conviction.

In the *Newsom* case, *supra*, the Texas Court of Criminal Appeals stated on page 889:

> "The doctrine laid down by the State in its motion for rehearing that it is incumbent on the defendant to show that his previous case has been appealed and reversed is borne out by cases of Tall v. Commonwealth, Ky., 110 S.W. 425, and Gragg v. Commonwealth, Ky., 104 S.W. 285, which hold that such is a matter of defense. We think this is a correct legal proposition."

In the *Newsom* case, the State itself showed that a motion for new trial was filed and overruled, and notice of appeal was given, and that the clerk never prepared a transcript, that the records of his court showed that a notice of appeal was given and that he issued a commitment to the sheriff ordering him to take appellant to the penitentiary, and that he did

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not know what disposition of the case was made by the Texas Court of Criminal Appeals.

The court in the *Newsom* case was concerned with preserving the right of appeal, stating that:

> ". . . the failure of any officer to perform his plain duty cannot deprive a person convicted of crime of his legal right to have this court review the proceedings in his case. Unless such notice of appeal was properly withdrawn, Cause No. 104 should have been presented to this court, at least by transcript showing the proceedings had therein; and the refusal or failure of any officer to perform his duty in connection therewith would not deprive appellant of any of his rights therein."

Petitioner herein had an adequate opportunity at the trial level, having been confronted with evidence, to establish, if he could, that the previous conviction was not final.

In approaching the question of due process, it must be remembered that in our particular dual form of government, nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as that power has been withdrawn by the Federal Constitution. *Hurtado v. California*, 110 U.S. 535 (1884). This Court may not pass upon the expediency, wisdom, or justice of the laws of the State, but may only determine their conformity with the Federal Constitution. In determining due process this Court may take into account only those fundamental rights which are expressed in that provision. *Twining v. New Jersey*, 211 U.S. 78 (1908). Due process requires that the

Court have jurisdiction, *Pennoyer v. Neff*, 95 U.S. 714 (1877), and that there shall be notice and opportunity for hearing given the parties. *Roller v. Holley*, 176 U.S. 398 (1899). Subject to these two fundamental rules, this Court has sustained all State laws regulating procedure, evidence, and methods of trial as being consistent with due process of law. *Walker v. Sauvinet*, 92 U.S. 90 (1875); *Caldwell v.* Texas, 137 U.S. 692 (1891); *Leeper v. Texas*, 139 U.S. 462 (1891); *In re Duncan*, 139 U.S. 449 (1891), and *Twining v. New Jersey, supra.*

From these decisions it is clear that the Fourteenth Amendment in no way undertakes to control the power of the State to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted complies with reasonable notice and affords fair opportunity to be heard. As stated in *Louisville and Nashville Railroad Co. v. Schmidt*, 177 U.S. 230 (1900):

> ". . . It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are compiled with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend; . . ."

See, also, *Hooker v. Los Angeles*, 188 U.S. 314 (1903), and *Rogers v. Peck*, 199 U.S. 425 (1905).

The cases cited by Petitioner on page 16 of his brief are cases descriptive of situations not existing in Petitioner's case herein, as is shown by the undisputed facts.

Conclusion

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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April ....., 1955

A copy of this Reply, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, have been mailed this date to Hon. Maury Hughes, (First Class Postage Prepaid). Also Howard Dailey, 522 Davis Bldg., Dallas, Texas.